

NAS Deprivation of Liberty Safeguards Policy – SO-0190

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Purpose of This Document

Some people living in National Autistic Society services cannot make their own decisions about their care and treatment because they do not have the mental capacity to do so. This policy helps managers and staff to understand their roles and

responsibilities in both reducing the likelihood of depriving someone of their liberty. This policy applies to all NAS services.

This policy must be read, understood and actively supported by all staff. This policy should be read in conjunction with:

- Use of Restrictive Practice in Schools & Services Policy SO-0039
- Positive Behaviour Support Policy SO-0029 & SO-0030
- Safeguarding Adults SO-0194
- Safeguarding Children SO-0189

Introduction

Liberty means being free to do the things you want to do and live where you want to live. Deprivation of liberty means taking someone's freedom away.

The National Autistic Society aims to deliver the care and support people need without restricting their personal freedoms. Those supported in NAS services are entitled to be cared for in the least restrictive way possible and support planning should always consider whether or not there are other, less restrictive options available to avoid unnecessary restriction of liberty. However, when all alternatives have been explored and the service believes that it is necessary to deprive an individual, in their best interest, of their liberty to give them care or treatment or protect them from harm, then this must be carried out within the correct legal framework. Staff should be trained to use approved Studio 3 techniques and carry out the required training to support persons in their service.

Please note this policy only applies to those people we support who have been assessed as not having capacity to agree to any restriction.

Every effort should be made, in both, commissioning and providing care or treatment, to prevent deprivation of liberty. If deprivation of liberty cannot be avoided, it should be for no longer than is necessary.

Deprivation of Liberty – Definition

The right to liberty is identified in Article 5 of the European Convention on Human Rights 1950 (ECHR). The state has an obligation for ensuring that this right is protected throughout the UK. Article 5 protects individuals from unlawful deprivation of liberty, but also recognises that sometimes, in the course of their care and treatment, it is necessary to detain somebody of 'unsound mind':

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty [unless he or she is of an unsound mind] and in accordance with a procedure prescribed by law.”

Depriving a person of his or her liberty is one of the most serious infringements on a person's human rights.

England and Wales

Mental Capacity Act 2005: There are three key questions to ask whether someone is deprived of their liberty:

1. Is the person subject to continuous supervision and control?

All three elements must be present – the oversight must be continuous (though does not have to be 'in line of sight'), it must amount to supervision, and have a clear element of control.

AND

2. Is the person free to leave?

The person may not be asking to go or showing by their actions that they want to but the issue is about how staff would react if the person did try to leave or if relatives/friends asked to remove them.

It may not be a deprivation of liberty, although the person is not free to leave, if the person is not supervised or monitored all the time and is able to make decisions about what to do and when, that are not subject to agreement by others.

AND

3. Does the person lack capacity to consent to these arrangements?

The Supreme Court ruled that the following factors are no longer relevant to whether or not someone is deprived of their liberty:

1. the person's compliance or lack of objection;
2. the suitability or relative normality of the placement (after comparing the person's circumstances with another person of similar age and condition);

AND

3. the reason or purpose leading to a particular placement

Though of course all these factors are still relevant to whether or not the situation is in the person's best interests.

The difference between restraint, restriction and deprivation:

The Mental Capacity Act 2005 allows appropriate restrictions and restraint to be used, but only if they are in the best interests of a person who lacks capacity to make the decision themselves. Restraint is appropriate when it is used to prevent harm to the person who lacks capacity and it is a proportionate response to the likelihood and seriousness of harm. Isolated appropriate use of restraint falls short of deprivation of liberty.

Restrictions and restraint can include:

- locking a door temporarily to guard against immediate harm
- the use of some medication, for example, to calm a person
- close supervision in the home
- requiring a person to be supervised when out due to immediate risks
- physically stopping a person from doing something which could cause them harm

- removing items from a person which could cause them harm
- holding a person so that they can be given care or treatment
- bedrails, wheelchair straps, and splints

Individual actions may not determine that someone is being deprived of their liberty, however, they may form part of the circumstances which subject a person to continuous supervision and control. It should be noted that any restriction or restraint implemented as part of an individual's agreed care plan needs to be in the best interest of the individual and recorded and monitored in line with the NAS' Use of Restrictive Practices in Schools and Adult Services policies (SO-0039).

Further guidance can be found at:

The Department of Health – www.gov.uk/government/publications/deprivation-of-liberty-safeguards-supreme-court-judgments

CQC -

www.cqc.org.uk/sites/default/files/media/documents/20140404_dols_briefing_for_health_and_social_care_providers.pdf

Mental Capacity Act 2005 Code of Practice -

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

Contact details for the Court of Protection are on its website at - www.gov.uk/court-of-protection

Scotland

The Adults with Incapacity Act 2000 sets out what constitutes a deprivation of liberty. In certain circumstances, the following measures may amount to a deprivation of liberty:

- Restraint (physical, technical or through medication)
- Seclusion
- 'time out'
- Use of electronic devices
- Overly intrusive observation
- Use of force
- Locked doors/wards
- Freedom to interact with others outside of the institution

Any assessment will also consider whether the person has validly consented to the restriction:

1. The specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.
2. Whether the person is, or is not, free to leave. Do the people treating or managing the person exercise complete and effective control over the person's care and movements?

The distinction between a deprivation of, and a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance. It is therefore more to do with how measures are applied and the accumulation of them, than specific restrictions that may tantamount to deprivation of liberty.

Other factors to be taken into account are:

- If the measure is of benefit to the person
- Relative normality of the situation

Further guidance can be found at:

Scottish Law Commission - www.scotlawcom.gov.uk

Northern Ireland

The Mental Capacity Act (NI) 2016 provides a statutory framework for people who lack capacity to make a decision for themselves and for those who now have capacity but wish to make preparations for a time in the future when they lack capacity.

A person is not to be treated as lacking capacity in relation to a Deprivation of Liberty unless it is:

- established that the person lacks capacity.
- A person lacks capacity in relation to a Deprivation of Liberty if they are unable to make a decision for himself or herself about the matter, because of an impairment of, or a disturbance in the functioning of, the mind or brain.

To test if a person who lacks capacity is deprived of his or her liberty the following questions must be asked:

1. is the person under continuous supervision and control?
2. is the person free to leave?

If someone is under continuous supervision and control and is not free to leave then they are subject to a Deprivation of Liberty.

A Deprivation of Liberty must be considered on individual merit and on the particular circumstances of each case; blanket assumption must not be made.

Restraint and detention amounting to Deprivation of Liberty are closely interlinked as it relates to compulsory limitations to a person's liberty. Restraint that is ongoing, planned or regular will most likely become Deprivation of Liberty.

More information can be found at: <https://www.health-ni.gov.uk/publications/mcani-2016-deprivation-liberty-safeguards-code-practice-november-2019>

Children and Young People

The UK Government passed the Mental Capacity (Amendment) Act 2019, which extends to England and Wales, to replace Deprivation of Liberty Safeguards (DoLS) with Liberty Protection Safeguards (LPS). As of 2023 this has not yet occurred.

The Liberty Protection Safeguards (LPS) will provide protection for people aged 16 and above who are, or who need to be, deprived of their liberty in order to enable their care or treatment and who lack the mental capacity to consent to their arrangements.

People who might have an LPS authorisation include those with dementia, autism and learning disabilities who lack the relevant capacity.

LPS authorisations can apply to 16 and 17 year olds in settings such as:

- social care settings including children's homes, short breaks and youth club provision
- education settings including day and residential schools and colleges
- hospitals, including inpatient mental health units

This is different from the existing system, (the Deprivation of Liberty Safeguards (DoLS)), which only applies to people aged 18 or over, in care homes and hospitals.

Equal Opportunities

No person we support will be discriminated against on the grounds that he/she has been the subject of deprivation of liberty proceedings. Neither will a person we support face a 'tougher standard for being deprived of their liberty than non-disabled people'.

Appendices and Other Related Policies and Documents

Related Document Name	Reference Number
5 Key Principles of Mental Capacity Act	SO-0190-001-0222
Criteria for Assessing Mental Capacity	SO-0190-002-0222
Deprivation of Liberty Checklist	SO-0190-003-0222
Deprivation of Liberty Children's Services Checklist	SO-0190-004-0222
Deprivation of Liberty Care Home Setting Quick Guide	SO-0190-005-0222
Deprivation of Liberty Home Setting Quick Guide	SO-0190-006-0222
Deprivation of Liberty Supported Living Home Setting Quick Guide	SO-0190-007-0222
Deprivation of Liberty NAS Centres	SO-0190-008-0222
Deprivation of Liberty Safeguards – PROCEDURE	SO-0190-009-0222